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No. 04-473

Supreme Court, U.S.
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In The

Supreme Court of the United States

GIL GARCETTI, *et al.*,

Petitioners,

vs.

RICHARD CEBALLOS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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CONSTITUTION

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PETITIONERS' REPLY BRIEF

Respondent contends that this Petition for Writ of Certiorari should be denied because there is no inter-circuit conflict on the question at hand: whether a public employee's speech expressed strictly pursuant to the duties of employment – as opposed to speech expressed pursuant to the rights of citizenship – is protected by the First Amendment. Notwithstanding Respondent's contention that the circuits have developed a uniform approach and answer to this question, review of the relevant legal landscape demonstrates, without question, the *absence of this purported consensus*. Indeed, in the two decades since this Court's decision in *Connick v. Myers*, there have been many decisions on either side of the fence, embroiling a majority of the circuits. This inter-circuit conflict has certainly burned long enough to warrant review by this Court.

In the Opinion below, the Ninth Circuit gave no weight to the fact that the subject speech was purely job-related and not expressed in conjunction with the exercise of Respondent's rights as a citizen.[1] Under the Ninth Circuit's approach, any speech that relates to a matter of public concern is constitutionally protected, even if there is no inkling of "citizen speech." However, not all courts have adopted this approach, thereby maintaining the vitality of "citizen speech" in this constitutional equation. Notably, in his special concurrence below, Judge O'Scannlain discussed at length the *absence of consensus among the circuits* on this very point and the need for review by this Court. Appendix A at 38-40, 50-51.

Respondent's contrary contention that the circuits have reached a level of harmony that should not be disturbed is based on a convenient self-serving premise: every case which conflicts with the holding below is factually

[1] Respondent's suggestion that he met with the Mexican-American Bar Association *prior* to the alleged acts of retaliation is not supported by the record. *See* Respondent's Opposition (hereinafter "Opp.") at 2.

distinguishable and therefore not a sign of inter-circuit conflict; every case which is consistent with the holding below is factually indistinguishable and therefore a sign of "overwhelming consensus." Opp. at 11. As discussed below, Respondent's cursory discussion of the cases illustrative of the inter-circuit conflict does not withstand the most basic scrutiny.

I. RESPONDENT GROSSLY EXAGGERATES THE PURPORTED INTER-CIRCUIT CONSENSUS ON WHETHER PURELY JOB-RELATED SPEECH IS CONSTITUTIONALLY PROTECTED.

The conflict among the circuits regarding the treatment of speech expressed strictly pursuant to the duties of public employment is understandable since this Court has not yet identified where this very common type of public employee speech falls within the *Pickering-Connick* matrix. What has been made clear in this construct is that a public employee's speech *is not protected* when the employee speaks as an employee regarding a personal interest, and *is protected* when the employee speaks "as a citizen upon a matter of public concern." *Connick v. Myers*, 461 U.S. 138, 147 (1983). Thus, what has been unanswered is whether a public employee is entitled to First Amendment protection whenever he speaks about a matter of public concern, with no regard to whether the employee is speaking "as a citizen" or pursuant to the duties of his or her public employment. While the Ninth Circuit has held that speaking about a matter of public concern, in and of itself, triggers the First Amendment in every instance, this position has not been uniformly embraced.

Respondent downplays the continuing inter-circuit conflict by alluding to purported factual distinctions and incomplete descriptions of unfavorable holdings. For instance, in discussing *Gonzalez v. City of Chicago*, 239 F.3d 939 (7th Cir. 2001), Respondent takes a dismissive approach even while acknowledging that the speech in *Gonzalez* involved "a police officer's official reports

discussing *police misconduct*, pursuant to his duties to investigate alleged misconduct." Opp. at 12, emphasis added. Respondent's assertion that *Gonzalez* is reconcilable with the Opinion below is unsupported by any substantive discussion of the analysis in *Gonzalez*. Respondent's cursory discussion of *Gonzalez* is not surprising in light of the significant factual parallels between *Gonzalez* and the instant case. Indeed, just as in *Gonzalez*, the subject speech in the instant case was expressed in the form of an official report (a routine disposition memorandum), pertained to alleged police misconduct and was prepared pursuant to Respondent's normal job duties.[2]

Another factually analogous case that Respondent attempts to devalue is *Thompson v. Scheid*, 977 F.2d 1017 (6th Cir. 1992), a case involving speech regarding misconduct by a public official. *See* Opp. at 21. In *Thompson*, the plaintiff, a county fraud investigator, investigated a county commissioner who may have improperly received public funds. *Thompson*, 977 F.2d at 1019. After his investigation, the plaintiff prepared a report which was forwarded to the county prosecutor, and afterward, the plaintiff spoke with agents from both the Office of Inspector General and the FBI. *Id*. The plaintiff was then warned by his supervisors that he was bound by confidentiality rules and "not to act without following Department policies and procedures." *Id*. No charges were filed against the county commissioner. *Id*. Subsequently, after receiving a written reprimand and accepting a position with another state agency, the plaintiff brought a section 1983 action against

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[2] Respondent attempts to deflect this Court's attention from *Gonzalez* by quoting the Seventh Circuit's comment that *Gonzalez* should be limited "to routine discharge of assigned functions, where there is no suggestion of public motivation." *Delgado v. Jones*, 282 F.3d 511, 519 (7th Cir. 2002); Opp. at 13. Even under this standard, however, Respondent's disposition memorandum (and discussion of same with his co-workers and supervisors) would not be entitled to First Amendment protection since the speech was indisputably made pursuant to his regular job duties, in direct conjunction with his prosecutorial obligations, not as an expression of "public motivation."

the county commissioner, his supervisors and the Department, alleging that he had been retaliated against for having exercised his First Amendment rights. *Id.* at 1019-20. The Court of Appeals held that the district court did not err in finding that the plaintiff's investigation "did not constitute speaking out on an issue of public concern and did not warrant First Amendment protection." *Id.* at 1020. Significantly, the *Thompson* Court rejected the plaintiff's contention that his communications related to his investigation were constitutionally protected because the investigation involved alleged fraud by the county commissioner, by focusing on the *job-related* nature of these communications:

> We find that plaintiff's conversations with [his supervisors] about the investigation, their reminder to plaintiff that his investigation was confidential, and their warning not to pursue the matter without going through appropriate Department procedures *concern plaintiff's duties as an employee of the Department*. Therefore, these conversations concern matters of internal department policy and *cannot be considered speaking out on matters of public concern*.

Id. at 1021 (emphasis added).

The legal analysis in *Thompson* is especially probative due to the similarity in facts, with respect to the nature of the speech involved, with not only the instant case but with *Gonzalez* and *Roth v. Veteran's Administration*, 856 F.2d 1401 (9th Cir. 1988) – the case on which the Court below relied in finding that Respondent's disposition memorandum was constitutionally protected. Thus, *Thompson* is another case, from yet another circuit, which demonstrates the necessity of review of the instant Petition.

Not only does Respondent fail to establish how there can be an "overwhelming consensus" in light of *Thompson* and *Gonzalez*, he also fails to provide any meaningful response to the Fourth Circuit's in-depth examination of *the role of citizen speech*, in *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (en banc).

> The *threshold inquiry* thus is whether the Act regulates speech by state employees *in their capacity as citizens* upon matters of public concern. If a public employee's speech made in his capacity as a private citizen does not touch upon a matter of public concern, the state, as employer, may regulate it without infringing any First Amendment protection. [Citations.] To determine whether speech involves a matter of public concern, we examine the content, context, and form of the speech at issue in light of the entire record. *See Connick*, 461 U.S. at 147-48, 103 S.Ct. 1684. . . . Further, the place where the speech occurs is irrelevant: An employee may speak as a citizen on a matter of public concern at the workplace, and may speak as an employee away from the workplace. [Citations.] *The Supreme Court has made clear that the concern is to maintain for the government employee the same right enjoyed by his privately employed counterpart.* To this end, in its decisions determining speech to be entitled to First Amendment protection the Court has emphasized the *unrelatedness of the speech at issue to the speaker's employment duties.* [Citations.] Thus, critical to a determination of whether employee speech is entitled to First Amendment protection is whether the speech is "made primarily in the [employee's] role as citizen or primarily in his role as employee." *Terrell*, 792 F.2d at 1362; [citations].

Id. at 406-07 (emphasis added).[3]

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[3] The thoughtful analysis in *Urofsky* even includes the description of a hypothetical situation remarkably similar to the facts of this case:

> This focus on the capacity of the speaker recognizes the basic truth that speech by public employees undertaken in the course of their job duties will frequently involve matters of vital concern to the public, without giving those employees a First Amendment right to dictate to the state how they will do their jobs. For example, *suppose an assistant district attorney, at the District Attorney's direction, makes a formal*

(Continued on following page)

This insightful exposition of the importance of the citizen speech element is not only consistent with the fundamental considerations at the heart of the *Pickering* rationale, but also brings focus to a practical reality ignored in the Opinion below – if the element of citizen speech is excised from this analysis, public employees will be afforded First Amendment protection for purely job-related speech while employees performing similar functions in the private sector will not. Consequently, public employees' access to the First Amendment will far exceed that of private employees whose speech will only be protected only when exercising their rights of citizenship in the public domain. This would constitute a dramatic (and unjustified) departure from the clear purpose of *Pickering* – to allow public employees to enjoy the same degree of First Amendment protection as those citizens who are privately employed.

These three cases, from three different circuits, in and of themselves represent compelling evidence of an entrenched inter-circuit conflict and the absence of the "overwhelming consensus" touted repeatedly by the Respondent without just foundation.[4] Moreover, *Gonzalez, Thompson* and *Urofsky* are hardly alone in their recognition that citizen speech and a public employee's entitlement to First

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statement to the press regarding an upcoming murder trial – a matter that is unquestionably of concern to the public. It cannot seriously be doubted that the assistant does not possess a First Amendment right to challenge his employer's instructions regarding the content of the statement. In contrast, when the same assistant district attorney writes a letter to the editor of the local newspaper to expose a pattern of prosecutorial malfeasance, the speech is entitled to constitutional protection because it is made in the employee's capacity as a private citizen and touches on matters of public concern.

Id. at 407-08 (emphasis added, footnote omitted).

[4] Respondent's contention that *Urofsky* should not be treated as a sign of an inter-circuit conflict is also contradicted by the Opinion below, in which the Ninth Circuit conceded that its holding was not consistent with *Urofsky*. *See* Appendix A at 16, n. 7.

Amendment protection are inextricably tied. *See Terrell v. University of Texas System Police*, 792 F.2d 1360, 1362 (5th Cir. 1986) ("Because almost anything that occurs within a public agency *could* be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee. In making this determination, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.") (emphasis in original); *DiMeglio v. Haines*, 45 F.3d 790, 805 (4th Cir. 1995) (holding that the defendant was entitled to qualified immunity because he reasonably could have believed that the plaintiff's speech was not protected since "it is at least questionable whether [the plaintiff]'s comments, *spoken within his public role and concerning a matter within the scope of his responsibilities*, were protected expressions upon which a retaliation claim could be based") (emphasis added); *Holland v. Rimmer*, 25 F.3d 1251, 1255-56 (4th Cir. 1994) (finding that the subject speech was not protected where the subject statements "were made as a supervisory employee to other employees, not as a citizen speaking out to the public about matters of public concern."); *see also* the cases cited in the Petition at 15-16.

Even cases published within the last year reflect the continuing nature of the inter-circuit conflict and the absence of uniformity in the approach used to calculate this constitutional equation. *See Sheaffer v. County of Chatham*, 337 F.Supp.2d 709, 718 (M.D.N.C. 2004) ("critical in ascertaining whether the speech was made *primarily in the plaintiff's role as employee or primarily in her role as citizen.*") (emphasis added); *cf. Coleman v. Board of Educ. of City of St. Louis*, 324 F.Supp.2d 1048, 1058 (E.D.Mo. 2004) ("In *Connick*, the Supreme Court explained that the key question is not whether the person is speaking in his role as an employee or a citizen, but whether the employee's speech in fact touches on a matter of public concern."). Thus, the cases discussed

above and in the Petition have contributed to a growing tapestry of cases that lacks the thread of consistency necessary to prevent future irreconcilable decisions involving First Amendment claims by public employees based on purely job-related speech. Indeed, the divergent opinions of the past two decades will most likely prevent the development of the "overwhelming consensus" about which Respondent prematurely speaks.

Review by this Court, therefore, will serve a timely and edifying purpose – not only by filling a significant gap in First Amendment jurisprudence but by educating thousands of public employers and their hundreds of thousands of employees.[5]

II. IN ADDITION TO ADDRESSSING THE ESTABLISHED INTER-CIRCUIT CONFLICT, REVIEW IS NECESSARY TO CARRY OUT THE FUNDAMENTAL PURPOSE OF THIS COURT'S HOLDING IN *PICKERING*.

Respondent does not discuss the historical context in which *Pickering v. Board of Education*, 391 U.S. 563 (1968) was decided, and this Court's repeated recognition of that important context in *Connick*, fifteen years later.

Only after this Court's decision in *Pickering* were public employees entitled to any First Amendment protection at all. Prior to *Pickering*, public employees, by virtue of their public employment, were deprived entirely of First Amendment protection. At the same time, *Pickering* did not open the door to First Amendment protection so

[5]. This Court's recent decision in *City of San Diego v. Roe*, 125 S.Ct. 521 (2004) (reversing the Ninth Circuit's holding that a police officer's sexually explicit speech, engaged in while off-duty, was constitutionally protected since it involved a matter of limited public concern), did not address the question raised here – whether a public employee's speech expressed purely pursuant to his or her job duties is entitled to First Amendment protection.

widely. Instead, First Amendment protection was clearly tied to the very public nature of the subject speech. *Pickering*, 391 U.S. at 574 ([where] "*the fact of employment is only tangentially and insubstantially involved* in the subject matter of the public communication made by a teacher, we conclude that *it is necessary to regard the teacher as the member of the general public he seeks to be*."). Thus, in *Pickering*, this Court did not afford First Amendment protection simply because the speech pertained to a matter of public concern but identified as significant factors 1) the relationship between the speech and the speaker's employment and 2) the speaker's intent to be treated as a citizen – and not as an employee.

That the holding in *Pickering* was deeply rooted in the relevant historical backdrop is evident from this Court's comments in *Connick*: "The explanation for the Constitution's special concern with threats to *the right of citizens to participate in political affairs* is no mystery. The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . *Pickering* . . . *followed this understanding of the First Amendment.*" *Connick*, 461 U.S. at 145 (emphasis added).

Indeed, this Court's comments in both *Pickering* and *Connick* demonstrate the substantial link between the extent of First Amendment protection afforded to public employees and the reality prior to *Pickering* – a longstanding era during which public employees did not have the freedom to engage in the interchange of ideas and public debates most emblematic of the First Amendment rights bestowed on every citizen of this country. This significant link, however, is rendered meaningless under the Ninth Circuit's approach since endowing purely job-related speech with First Amendment protection does not advance the fundamental concerns that finally broke down the wall that had kept all public employees in a state of First Amendment oblivion.

This disconnect between the underlying, fundamental concerns identified in *Pickering* and the breadth of First

Amendment protection in the public employment setting has been cemented in the Ninth Circuit, and others. At the same time, this disconnect has been recognized and prevented from taking root in circuits where a more historically sensitive approach – punctuated by a more intricate interpretation of *Pickering* and *Connick* – has been adopted in assessing whether job-related speech is constitutionally protected. Before these divergent paths become even more entrenched, Petitioners urge this Court to take this opportunity to address this important issue of law.

CONCLUSION

The Petition for Writ of Certiorari should therefore be granted.

Respectfully submitted,

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